



The WALT DISNEY Company

Susan L. Fox
Vice President
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December 3, 2008

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TWB204
Washington, DC 20554

Re: MB Docket Nos. 07-29 and 07-198

Dear Ms. Dortch:

This letter responds, in summary fashion, to reports that the Commission may consider at its December 18 meeting a Further Notice of Proposed Rulemaking that makes certain "findings" regarding the distribution contracts of television programmers and seeks comment on: (1) a rule proposed by Cablevision less than two weeks ago that would impose unprecedented restrictions on the contracting freedom of programmers not vertically integrated with any MVPD;¹ (2) a ban on non-cost-based volume discounts; and (3) elimination of the requirement that local broadcast stations be carried on the entry level of service for all customers. For the reasons stated below, The Walt Disney Company strongly opposes these three proposals, and their associated "findings," and urges the Commission not to adopt the Further Notice of Proposed Rulemaking.

First and foremost, the eve of a change in President of the United States and the naming of a new Chairman of the Commission, is not the right time to launch major and

¹ Cablevision's proposal, as contained in a November 22 e-mail to Michelle Carey and Monica Desai from Michael Olsen, is as follows:

"No cable programming vendor or broadcast station electing retransmission consent for carriage on a cable system shall enforce or execute any provision in a contract with an MVPD that directly or indirectly-

- (a) sets as a condition of carriage the number of viewing subscribers (whether such number is stated as a total number of viewing subscribers or a percentage of an MVPD's video subscribers),
- (b) prescribes the service tier, package or level where such programming or station must be carried
- (c) sets a single rate other than a rate per viewing subscriber (regardless of the tier, package, volume or level of carriage), or
- (d) otherwise restricts, is intended to restrict, or has the effect of restricting, the MVPD's packaging or pricing of such programming or stations.

All such restrictions in existing contracts are null and void."



controversial new initiatives. The fact that the Commission is facing the daunting challenges of the DTV Transition is further reason to not launch controversial new initiatives at this time. In this regard, please see the attached letter to the Commission dated September 8 from the bi-partisan leadership of the Senate Commerce Committee which states that "[p]ursuing contentious policy initiatives, such as the unbundling of wholesale subscription television channels, would divert attention of the Bureau at this critical time."

Second, the Commission has absolutely no statutory authority - none - to even propose the rules in the Further Notice. The Commission has no statutory authority to regulate the contracting practices of programmers not vertically integrated with MVPDs, no authority to regulate volume discounts, and no authority to change the statutory provisions regarding cable carriage of broadcast stations. It would be irresponsible to issue a Further Notice proposing rules that are so clearly beyond the Commission's jurisdiction. Further, simple incantation of antitrust buzzwords does not vest the Commission with authority to adopt the proposed rules nor substitute for the rigorous fact-finding process and economic analysis that antitrust laws require.

Third, there is presently pending in the United States District Court for the Central District of California, a class action Complaint challenging the very same contracting practices by programmers and MVPDs that the rules in the Further Notice seek to regulate. A copy of the Amended Complaint is attached. Indeed, Disney – as well as all defendants in that litigation – have denied the factual allegations and legal conclusions of the Complaint. Cablevision is one of those defendants and attached is a copy of Cablevision's Answer to the Complaint, in which Cablevision asserts that the Complaint should be dismissed with prejudice. Specifically, Cablevision flatly and unequivocally denies paragraphs 50-52 of the Complaint, which allege that: (50) "consumers ... have been injured in their business and property because they have been deprived of choice, have been required to purchase product they do not want, have paid inflated prices for cable television programming, and have been denied the benefits of innovation and competition resulting from the foreclosure of smaller programmers which have been excluded by the programmers' exercise of market power ..."; (51) "competition, including price competition at the consumer level for multi-channel video programming services has been ... restrained, suppressed or eliminated"; and (52) "competitors ... have been, and will continue to be, restrained from vigorously competing with one another for selling and acquiring cable programming services as a result of the contracts and combination described herein." Cablevision also denied paragraph 53 "to the extent that any response is required," which contains an allegation that, "as a direct result of the unlawful actions of defendants, and each of them, plaintiffs and Class members have been deprived of choice and have paid significantly more for cable and satellite subscriptions that they would have in absence of the illegal agreements." Thus, the "findings" in the Further Notice constitute wholly inappropriate interference in the Court-ordered process resolving the issues raised in that ongoing litigation.

Fourth, Disney consistently has argued that the retail price of cable is quite reasonable, particularly compared to other consumer entertainment costs in our society.



However, to the extent that MPVDs now are asserting to the Commission that program costs are the primary component of their retail prices, we would like to point out some public facts that demonstrate that program costs represent only a small fraction of cable's retail price. According to analyst Paul Kagan, the average 2007 retail cost of expanded basic cable programming services was \$60.30, while approximately \$22 of that amount was attributable to programming costs.²

Fifth, to the extent that the Further Notice is being driven by concerns for retail a la carte, Disney re-iterates that such a proposal would result in consumers getting less, but paying more. Moreover, Disney continues to offer individual episodes of its programming on an a la carte basis via its Emmy Award winning media player. For ABC programs alone, there have been over 450 million episodes started since the player launched in September 2006, and the media player now includes HD streaming.

Finally, the rule proposed by Cablevision would have particularly severe anti-consumer effects. Existing programmer contracts are the result of arms length negotiations and form the basis for expanded basic packages of services. Customers reasonably expect to find the most popular services in their expanded basic service. The wildly pro-consumer history of Disney Channel's migration from an a la carte service to expanded basic was accomplished through exactly the kind of programming contracts that the Proposed Notice would prohibit! That migration was greeted with acclaim from consumers, City Councils and Mayors all across the Country. For example, attached is a copy of the press release issued by Cox Cable of San Diego when Disney Channel migrated from a \$9.95 a la carte service to part of expanded basic pursuant to a programming contract that would be prohibited by the rule proposed in the Further Notice. Also attached are newspaper reports describing that contractual migration as a "Special Gift To All Customers". One columnist summed up the change this way - "The winners? Latch-key kids, shut-ins and the general public". Plainly, this Commission should not send the next Commission hurtling down a path to prohibit the kind of contracts that enabled the migration of Disney Channel from an expensive a la carte channel to an expanded basic offering.

Sincerely,

A handwritten signature in blue ink that reads "Susan L. Fox".

Susan L. Fox

cc: Chairman Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Commissioner Robert McDowell
Michelle Carey

² Broadcasting & Cable, July 7, 2008, citing a regulatory filing by Time Warner (July 7, 2008).



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